clearly presented as to the power of the Commission to compel the construction of a new branch line. The Commission's assertion of this authority was rested upon the provisions of Section 36 of the California Public Utilities Act.

The validity of the power which the Commission sought to exercise turns upon the scope of the railroad company's dedication to public use. Within the field of dedication, the regulative authority has ample freedom of action. Improved train service may be required,[5] as may switching connections between railroads.[6] A passenger station may be ordered built,[7] or even double tracks along a street already occupied by a single track may be required to be constructed.[8] Requirements of this character represent a legitimate exercise of the police power. Of a totally different character, however, is an order compelling extension and service in a field not embraced within the limits of original dedication. A railroad corporation does not, by virtue of its public undertaking, forfeit control over the limits of its enterprise; it may still determine the essential scope of its operations. Although orders to extend their mains and lines have been given to water, gas, and telephone companies, such extensions have only been ordered within a certain district to which service was already tendered, such as a city, and no extension can be ordered to a new territory beyond that offered to be served.[9]

The error of the Commission consists in the assumption that the power to regulate within the field of the tender of service comprehends authority to compel extensions in a distinct field not covered by the original dedication to public use. A similar error on the part of the Commission was corrected by the Supreme Court in Del Mar Water Company v. Eshleman.[10]

J. L. K.

STATUTORY CONSTRUCTION: REPEAL BY IMPLICATION.—The Code of Civil Procedure gives a right of action generally to the representatives of any person, not a minor, whose death has been caused by the wrongful act or neglect of another.[1] This section, however, can apply only where the decedent would himself have had a right of action for the injury, so that until 1907 an employer

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[5] Mo. Pac. Rr. Co. v. Kansas (1910), 216 U. S. 262, 54 L. Ed. 472, 30 Sup. Ct. Rep. 330.

[6] Wisconsin, Minn. & Pac. Rr. v. Jacobson (1900), 179 U. S. 287, 45 L. Ed. 194, 21 Sup. Ct. Rep. 115.

[7] Minneapolis & St. Louis Rr. Co. v. Minn. (1904), 193 U. S. 53, 48 L. Ed. 614, 24 Sup. Ct. Rep. 396.

[8] Phoenix Ry. Co. v. Geary (1915), 239 U. S. 277, 36 Sup. Ct. Rep. 45.

[9] 1 Wyman, Public Service Corporations, p. 672; Lukrawka v. Spring Valley Water Co. (1915), 169 Cal. 318, 146 Pac. 640; Crouch v. Arnett (1905), 71 Kan. 49, 79 Pac. 1086; Del Mar Water Co. v. Eshleman (1914), 167 Cal. 666, 140 Pac. 591.

[10] Supra, n. 9.

[1] Cal. Code Civ. Proc., § 377.

was not liable for the death of an employee where he might avail himself of the defense of assumption of risk or of the fellow servant rule.[2] In that year section 1970 of the Civil Code was amended so as to deprive the employer of these defenses in certain specified cases, and to provide that "when death . . . . results from an injury to an employee received as aforesaid, the personal representative of such employee . . . . may recover damages . . . . on behalf of the widow, children, dependent parents, or dependent brothers and sisters, in the order of precedence named," thus restricting recovery to dependents. In *Gonsalves v. Petaluma and Santa Rosa Railway Company*[3] the Supreme Court held that this amendment is conclusive only in cases in which the employee's right of action is created by it, and that in such actions by the representatives of employees as were maintainable before the amendment was passed, the general provisions of the Code of Civil Procedure are still in force, so that in those actions a recovery may be had on behalf of parents without showing dependence.

The contention that section 1970 had abrogated the earlier section in all suits brought by the representatives of employees seems to have been based upon the theory that a special law will prevail over a general law treating the same matter;[4] but the application of this principle must plainly be subject to the broader rules that "legislative intention is the first principle of statutory construction,"[5] and that the legislature will not be presumed to have intended a repeal where none is expressed, unless the provisions of two acts cannot be reasonably construed together without repugnance.[6] It is apparently upon this ground, supported by similar decisions in other jurisdictions,[7] that the court held that section 1970 should be construed with and not as superseding the general provision of the Code of Civil Procedure. The court says, "There is no language in our law which prompts, much less which forces the view that the legislature thus designed to restrict this right of

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[2] See Cal. Civ. Code, § 1970, as it stood before 1907.

[3] (Aug. 5, 1916), 52 Cal. Dec. 247, 159 Pac. 724.

[4] See the decision of the principal case in the District Court of Appeal (Nov. 5, 1915), 21 Cal. App. Dec. 640.

[5] Daniels v. State (1898), 150 Ind. 348, 50 N. E. 74; Sutherland, Statutory Construction, § 276 et seq.

[6] Daniels v. State (1898), 150 Ind. 348, 50 N. E. 74; Lawrence v. Town of Mansfield (1911), 129 La. 672, 56 So. 633; Pattinson v. Flayer (1909), 158 Mich. 56, 122 N. W. 215; State v. Cosgrave (1909), 85 Neb. 187, 122 N. W. 885; McGavisk v. R. R. Co. (1869), 34 N. J. Law 509; Davis v. Knights of Honor (1900), 165 N. Y. 159, 58 N. E. 891; State v. County Court (1909), 54 Ore. 255, 101 Pac. 907; Isham v. Bennington Iron Co. (1847), 19 Vt. 230; Hartig v. City of Seattle (1909), 53 Wash. 432, 102 Pac. 408; Sutherland, Statutory Construction, § 275 et seq.

[7] Colorado Milling and Elev. Co. v. Mitchell (1899), 26 Colo. 284, 58 Pac. 28; Gohen v. Texas Pac. Ry. (1876), Fed. Cas. 5506; Chiara v. Stewart Mining Co. (1913), 24 Idaho 473, 135 Pac. 245; Payne v. N. Y. etc. R. Co. (1911), 201 N. Y. 436, 95 N. E. 19; Staats v. Twohy Bros. Co. (1912), 61 Ore. 602, 123 Pac. 909; St. Germain v. Potlatch (1913), 76 Wash. 102, 135 Pac. 804.

action (that given by the Code of Civil Procedure) in cases where the death of an employee had been negligently caused;" that is, in cases where the right existed before section 1970 was amended. It would seem that the court might have gone further and found language which explicitly negatives the existence of such a design, for the application of the amendment is by its terms expressly limited to cases in which "death results from an injury to an employee received as aforesaid." This phrase "received as aforesaid" seems to indicate that the legislature was simply providing a remedy in those causes of action which it had just created in the first part of the enactment.

C. A. R.

TORTS: SPITE FENCE.—There is much divergence of judicial opinion as to the liability of the owner of land for using it, not for any benefit to himself, but purely to the detriment of his neighbor. Some states hold that an owner may erect on his land, near the boundary, an abnormally high fence, not for any advantage of his own, but merely to darken his neighbors' windows or to obstruct the view.[1] The courts which deny compensation for the damage inflicted by spite fences proceed upon the assumption that the owner of land, by virtue of his ownership, has an absolute right to erect such a fence. As Ames points out,[2] "If, in truth, the owner's right is absolute in this respect, how can it be taken away from him by statute?

The immunity from liability for maintaining spite fences probably exists in England. "No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious."[3] On the other hand in France and Germany the owner is liable in tort.[4]

In the United States an opinion by Mr. Justice Morse[5] marks the beginning of the trend of authority away from the traditional view and holds that if an owner makes such an obstruction as a fence with the intention of injuring his neighbor, and without any advantage or benefit to himself, it is a nuisance for which his neighbor has a right of action. While Justice Morse's opinion was not concurred in by a majority of the court it has been followed since in Michigan.[6] A number of jurisdictions now hold that an adjoining landowner may sue for damages caused by, or may enjoin the erection or maintenance of a spite fence erected for the

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[1] Russell v. State (1904), 32 Ind. App. 243, 69 N. E. 482; Bordeau v. Greene (1899), 22 Mont. 254, 56 Pac. 218; Brostrom v. Lauppe (1901), 179 Mass. 315, 60 N. E. 785; Mahan v. Brown (1835), 13 Wend. 261.

[2] Tort Because of Wrongful Motive, 18 Harvard Law Review, 411, 415, n.

[3] Mayor v. Pickles [1895] App. Cas. 587.

[4] 18 Harvard Law Review, 414.

[5] Burke v. Smith (1888), 69 Mich. 380, 37 N. W. 838.

[6] Peck v. Roe (1896), 110 Mich. 52, 67 N. W. 1080; Flaherty v. Moran (1890), 81 Mich. 52, 45 N. W. 381, 8 L. R. A. 183.